IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 302 of 1999

in

COMPANY PETITION No 157 of 1995

with

Co. Application Nos. 360/98, 58/99, 66/99 and 244/2000

in

Company Petition No. 139 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ICICI LTD.

Versus

O.L. OF A'BAD MFG. & CALICO PRINTING CO.LTD.

Appearance:

1. Company Application No.302 of 1999
Mr.Mihir Thakore for SINGHI & BUCH ASSO. for Petitioner
MR ASHOK L SHAH for Respondent Nos. 1 and 2
MR DS VASAVADA for Respondent No. 3
MR RM DESAI for Respondent No. 4
MR PRANAV G DESAI for Respondent No. 5-7
NOTICE SERVED BY DS for Respondent No. 8

2. Company Application No.360 of 1998

Mr.D.S. Vasavada for the applicant.
Mr.R.M. Desai for respondent No.5.

3. Company Application No.58 of 1999

Mr.Mihir Thakore for Singhi & Buch Asso.
for the petitioner.
Mr.Shalin Mehta for respondent No.1.
Mr.D.S. Vasavada for respondent No.2.
Mr.L.D.Dave and Mr.R.M. Desai for respondent No.3
Mr.P.G. Desai for respondent No.6.
Respondents 4 and 5 served.

4. Company Application No.66 of 1999

Mr.Mukul Sinha for the applicant.
Mr.Pranav G. Desai for respondents 2 and 4.

5. Company Application No.244 of 2000

Mr.D.S. Vasavada for the applicant.
Mr.Mihir Thakore for Mr.Singhi & Buch for
respondent No.3.
Mr.R.M. Desai for respondent No.4
Mr.Pranav G. Desai for respondent No.5

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 19/01/2001

C.A.V. JUDGEMENT

1. Company Application No.302 of 1999 has been filed

by the applicant ICICI Limited for following prayers :-

" ... ...

(A) This Hon'ble Court may be pleased to direct the Official Liquidator acting as Liquidator of Ahmedabad Jubilee Mills Limited (in liquidation) to hand over the properties, both movable and immovable, more particularly described in the Schedule to the Agreement dated 24.6.1983 between The Ahmedabad Mfg. & Calico Prtg. Co. Ltd. and Gaurav Chemtex Industries Ltd being property of The Ahmedabad Mfg. & Calico Prtg. Co. Ltd. (in liquidation) and the Official Liquidator acting as Liquidator of The Ahmedabad Mfg. & Calico Prtg Co. Ltd. (in liquidation) to take into custody and / or under his control all the properties forming part of The Ahmedabad Mfg. & Calico Prtg Co. Ltd (in liquidation) which are presently in possession of the Official Liquidator acting as Liquidator of Ahmedabad Jubilee Mills Limited (in liquidation);

(B) This Hon'ble Court may be pleased to direct the Official Liquidator to transfer the amount realised out of sale of the plant and machinery, fixtures, furniture, spares, stores, etc. and presently lying as deposit in the Account of the Ahmedabad Jubilee Mills Ltd (in liquidation) to the account of The Ahmedabad Mfg. & Calico Prtg Co. Ltd (in liquidation for being applied to discharge the liabilities of The Ahmedabad Mfg. & Calico Prtg. Co. Ltd (in liquidation) to its secured creditors and workers.

... ... "

2. It is the case of the applicant that the applicant is a Company and is a financial institution established, inter alia, to function as the principal credit and lending agency for promotion of diverse industries. The Ahmedabad Manufacturing & Calico Printing Co. Ltd. (in liquidation) (which will be referred hereinafter as `Calico', for short), vide its letter dated 7th April, 1983, sought the approval of the applicant Company for the purpose of approval to the proposed reorganisation of Calico and the applicant agreed, in principle, to the proposed reorganisation subject to certain terms and conditions. One of the conditions was that the term loans availed from the financial institutions would be retained by Calico itself and would not be transferred to the subsidiary companies. Further, the properties of the subsidiary companies would continue to be charged to the financial institutions. That certain other terms and conditions have been mentioned in paragraph 3 of the present application. It is the say of the applicant that the Calico on 24.6.1983 entered into an agreement with one Gaurav Chemtex Industries Ltd. and by the said Agreement, Calico had agreed to transfer the undertaking, business and operation of its Division, known as "Jubilee Unit" to Gaurav Chemtex Industries Ltd. Said Gaurav Chemtex Industries Limited was subsequently renamed as "Ahmedabad Jubilee Mills Ltd." (`Jubilee', for short). Under the said Agreement, certain properties, movable and immovable, of Calico, belonging to the Jubilee Unit, and more elaborately mentioned in the Schedules to the said agreement were proposed to be transferred to Gaurav Chemtex Industries Ltd. According to the applicant, the said properties of Jubilee were charged to the applicant and accordingly, any transfer if and when effected would only give to the purchaser the right in the said properties less the amount due and payable to the applicant as to that extent, the applicant had proprietary interest in the said properties. It is further the say of the applicant in the application that various loans were advanced by the applicant to Calico and to secure the due payment of various loans advanced from time to time by the applicant to Calico, Calico created charges over all its movable and immovable properties including the properties belonging to its Division, Jubilee Unit, and for that purpose, various deeds of hypothecation on various dates were executed. It is the say of the applicant that Calico also created charge over its immovable properties in favour of the applicant by executing undertakings to create mortgage in respect thereto in favour of the applicant. It is also

the say of the applicant that all the movable and immovable properties belonging to Calico, including the movable and immovable properties of its Jubilee unit have been charged to the applicant. It is also the say of the applicant that the applicant was not a party to the Agreement entered into between Calico and Gaurav Chemtex Industries Ltd. and neither the terms thereof bind the applicant nor curtail their rights in any manner nor it would relieve Calico of its obligation with respect to its liabilities towards the applicant. According to the applicant, Calico continues to be liable and the said properties and the charge created thereupon continue to be valid in favour of the applicant.

3. It is also their case that no movable or immovable properties of Calico have actually been transferred or conveyed by Calico to Gaurav Chemtex Industries Limited / Ahmedabad Jubilee Mills Ltd. (in liquidation) and the said properties continue to be owned by Calico and even though the possession of the said properties was handed over to Gaurav Chemtex Industries Ltd. / Ahmedabad Jubilee Mills Ltd. (in liquidation), the ownership in the said properties was never transferred by Calico to Jubilee and the said properties continue to remain in the ownership of Calico. It is also the say of the applicant that in response to an application moved by the Official Liquidator for possession of 128 looms which were agreed to be transferred under an agreement dated 24.6.1983 by Calico to Jubilee, Calico filed an affidavit categorically stating that the said looms had not been conveyed to Jubilee and are still of the ownership of Calico.

4. According to the applicant, various movable and immovable properties which came into the possession of the Official Liquidator acting as Liquidator of Jubilee, on Jubilee being wound up, are not the properties owned by the Jubilee, but are owned by Calico and that the Official Liquidator acting as Liquidator of Jubilee has sold certain plant and machinery purportedly belonging to Jubilee and has realised the sale proceeds therefrom. According to the applicant, sale realisation out of such sale of the plant and machinery by the Liquidator of Jubilee and other properties movable and immovable which are in possession of the Liquidator of the Jubilee and which have still not been disposed of are owned by Calico and are required to be handed over by the Liquidator of the Jubilee to the Official Liquidator acting as Liquidator of Calico for being applied towards the liabilities of secured creditors and workers of Calico (in liquidation).

5. It is the grievance of the applicant that the action of the Official Liquidator acting as Liquidator of Jubilee to sell and dispose of the properties of Calico without verifying whether the said properties belong to Jubilee or not is ex facie illegal. It is also the case of the applicant that since Calico had obtained various loans from the applicant and had also undertaken to create mortgage on its immovable properties in favour of the applicant and other financial institutions, Calico filed an Application under Section 536(2) of the Companies Act, inter alia, seeking sanction of the Gujarat High Court to validate the said transactions involving disposition of the properties by Calico as the loans were obtained by Calico in the ordinary course of business and for the purpose of meeting its obligations and keeping its business going. The said application was registered as Company Application No.10 of 1991 in Company Petition No.27 of 1987, and the Company Judge, by his order dated 6.5.1992, declared that any financial arrangement which may be entered into by Calico after commencement of winding up and which may entail disposition of the properties shall not result in any such disposition of the properties and the disposition of the properties which may take place to be void.

6. O.J. Appeal against the said order was dismissed, but the Special Leave Petition, which was preferred by the applicant before the Honourable Supreme Court, was registered as S.L.P. (Civil) No.10278 of 1995 and the Honourable Supreme Court, by its order dated 11.12.1995, was pleased to issue notice and subsequently, leave was granted. It is the case of the applicant that in the stay application, the Apex Court passed an order of status quo with respect to the properties of Calico in question. It is the say of the applicant that in view of that, the properties of Calico cannot be put to sale. However, the Advocates of both the sides, ultimately, submitted that the issues involved in the present applications are different as ultimately, it is required to be considered whether certain properties belong to Calico or Jubilee and accordingly, as per the submission of the Advocates, the status quo order granted by the Supreme Court has nothing to do with the controversy so far as the present application is concerned.

7. The applicant has also further stated that they have preferred Company Application No.58 of 1999 in Company Petition No.139 of 1988, by which it is prayed that the Official Liquidator of Jubilee Mills Limited (in liquidation) be restrained from dealing with any of the

assets of Jubilee Mills Ltd. (in liquidation), including the realisations out of the sale of its assets (excluding land and building) till such time as the Civil Appeal No.4410 of 1997 filed by the Applicant before the Supreme Court is disposed of.

8. On the aforesaid averments, the present Company Application No.302 of 1999 has been filed by the present applicant. It is the say of the applicant that the Official Liquidator, acting as Liquidator of Jubilee cannot sell and dispose of the properties, which actually belongs to Calico. It is the say of the applicant that the ownership of the said property cannot be said to have been transferred legally in favour of Jubilee as full consideration has not been paid. For that purpose, the applicant has relied upon the statement of affairs of Jubilee. It is also the say of the applicant-Company that the properties which are in possession of Jubilee are subject to the charge of the applicant as the applicant is a secured creditor with respect thereto, and the applicant stands outside the winding up and is entitled to take over possession of the said properties and also will be entitled to the realisation from the sale thereof from the Liquidator of Jubilee through the Official Liquidator of Calico for being applied towards its dues. It is averred in the application that the amount realised by the Official Liquidator as Liquidator of Jubilee has also to be utilised for discharging the liabilities of the secured creditors and workers of Calico and that the same cannot be utilised for discharging any liability of Jubilee. It was prayed that the O.L. of Jubilee (in liquidation) should be restrained from disbursing any amount realised out of the sale of the properties in question.

9. So far as Company Application No.360 of 1998 is concerned, the same has been filed by the Textile Labour Association against the O.L. of Jubilee Mills Ltd. for necessary direction against the O.L. in charge of the affairs of the Jubilee Mills Limited for payment of certain amount to the workers of Jubilee. It is submitted in that application that Jubilee Mills Ltd. has been ordered to be wound up by this Court by passing order in Company Petition No.139 of 1986 and the Liquidator has already taken possession of the assets of the Company and that the Sale Committee has already been appointed in Company Application No.200 of 1996 for disposing of plant and machinery and that the sale has already been confirmed by this Court and that an amount of Rs.4/-crore-odd are lying with the Official Liquidator. Accordingly, appropriate directions were

sought for in that application for disbursement of the amount. All secured creditors of the Company are also joined as parties in that application. However, it seems that there was some dispute whether I.C.I.C.I. was a secured creditor of Jubilee Mills (in liquidation) or not.

10. So far as Company Application No.66 of 1999 is concerned, that has been filed in the matter of Jubilee Mills (in liquidation), i.e. in Company Petition No.139 of 1988. . That application is filed on behalf of seven workmen of the Jubilee Mills Limited (in liquidation). It was stated that those workmen are not members of the T.L.A. and, therefore, separate application has been filed by them regarding their claim. It is pointed out in that application that as per the Statement of Affairs filed on 19.11.1990 under Section 454 of the Companies Act, 1956, the I.C.I.C.I. is not shown as secured creditor and, therefore, I.C.I.C.I. is neither fully nor partly a secured creditor and that the Statement of Affairs does not show any loan whatsoever being taken by the Jubilee Mills Limited (in liquidation) from the I.C.I.C.I. So, as per the said application, I.C.I.C.I. has no security whatsoever against any of the assets of the Jubilee Mills Limited (in liquidation) and that the I.C.I.C.I. is not a creditor qua the Jubilee Mills Limited. Ultimately, it was prayed that the Liquidator may be directed to disburse the dues of the applicant-workmen and that it should be declared that the I.C.I.C.I. is not a secured creditor in relation to Jubilee Mills Limited (in liquidation) and to declare that the I.C.I.C.I. has no claim whatsoever against Jubilee Mills Limited (in liquidation).

11. So far as Company Application No.244 of 2000 is concerned, the same has been given by the T.L.A. in the matter of Jubilee Mills Limited (in liquidation) and by the said application, it is prayed that the Sale Committee may dispose of the and land building of Jubilee Mills Ltd. (in liquidation) and may also dispose of the Sewing Thread Plant of the Jubilee Mills Ltd (in liquidation), which is lying in the compound of Calico Mills and it is also prayed to direct the existing Committee to dispose of the GPD and Coal ashes, Pasti and Raddi of the Jubilee Mills Ltd. (in liquidation).

12. Accordingly, so far as Company Application Nos.58 of 1999 and 302 of 1999 are concerned, the aforesaid applications have been filed by I.C.I.C.I. Limited, wherein they have asserted their rights over the property in question. As stated earlier, so far as Company

Application No.302 of 1999 is concerned, the same is filed against the O.L. of Calico Printing Company Ltd. (in liquidation) and so far as Company Application No.58 of 1999 is concerned, the same has been filed in the matter of Jubilee Mills Ltd. (in liquidation). The basic contention of the I.C.I.C.I. Limited in the aforesaid applications are to the effect that the property has not passed legally from Calico to Jubilee and that the I.C.I.C.I. is, even otherwise, the first charge-holder over the said property which is in possession of the Liquidator of Jubilee. So far as other Company Application Nos. 360 of 1998, 66 of 1999 and 244 of 2000 are concerned, the same, as stated earlier, are at the instance of T.L.A. as well as the workmen for disbursement of the amount and for necessary direction against the Liquidator of Jubilee Mills Ltd. (in liquidation).

13. In all these Applications, therefore, the basic question which requires to be considered is whether the property in question can be said to be of Jubilee Mills Ltd. (in liquidation) and whether I.C.I.C.I. can be said to have any charge over the aforesaid property which is in the possession of the Liquidator of Jubilee Mills Ltd. (in liquidation).

14. During the pendency of the aforesaid applications, another Application was given by the I.C.I.C.I., being Company Application No.382 of 2000 in Company Application No.302 of 1999, in the matter of Calico (in liquidation), wherein it is prayed that the Official Liquidator of Jubilee Mills be directed to disclose before the Court the amount of consideration alleged to be paid by Jubilee Mills Ltd. (in liquidation) to Ahmedabad Manufacturing and Calico Printing Co. Ltd. (in liquidation) in pursuance of Agreement dated 24th June, 1983 for the properties transferred thereunder by Calico Mills Ltd. to Gaurav Chemtex Industries Ltd.

15. There are certain factual aspects which are required to be considered in the present proceeding. On 23.5.1983, Calico had entered into an agreement for reorganisation of the Jubilee Mills and on 29.5.1983, plant, machinery, land and building were transferred to Jubilee Mills Limited. Till 9th March, 1987, the Jubilee Mills worked as a separate legal entity under the Companies Act and it was registered as a separate Company as Jubilee Mills. On 5.9.1989, the High Court passed an order winding up Jubilee Mills.

16. Since the parties have addressed the Court in Company Application No.302 of 1999, wherein the basic controversy about the right, title and interest of I.C.I.C.I. Limited is the subject matter, the detailed reasons are given in the aforesaid Company Application No.302 of 1999.

17. It is argued by Mr.Thakore, appearing for I.C.I.C.I. Limited that I.C.I.C.I. is a creditor of Calico and is interested in protecting the assets of Calico, which would enure for the benefit of the secured creditors, workers and other creditors of Calico. I.C.I.C.I. has, therefore, locus standi to file the present application seeking reliefs claimed therein. It is stated by Mr.Thakore that all the movables of Calico as existing prior to 1983 and even thereafter are hypothecated to I.C.I.C.I. So far as the immovable properties of Calico are concerned, various undertakings were given from time to time by Calico to mortgage all the properties in favour of I.C.I.C.I. and that, therefore, an application was filed by Calico before this Court for permission to mortgage the properties to I.C.I.C.I. and the matter is ultimately pending in the Supreme Court. It is his say that sale of movables, i.e. plant and machinery, hypothecated by Calico in favour of I.C.I.C.I., was effected by the Sale Committee appointed by this Court and the proceeds thereof are lying with the O.L. of Jubilee. Regarding immovable property, it was argued by Mr.Thakore that the immovable properties, owned by Calico, can only be transferred by registered conveyance executed by Calico in favour of Jubilee and in absence of registered conveyance, the immovable properties would continue to be owned by Calico. To substantiate his contention, Mr.Thakore has relied upon the provisions of Section 54 of the Transfer of Property Act and the provisions of Section 17 of the Indian Registration Act. According to him, therefore, there was no conveyance in the eye of law so far as the immovable properties are concerned. He, therefore, submitted that all the immovable properties of Calico situated at its Jubilee Unit, including the land and building, referred to in the aforesaid Agreement dated 24.6.1983 have never been conveyed or transferred from Calico to Jubilee and, therefore, Calico continues to be its owner and no right, title or interest is conferred in favour of Jubilee so far as immovable properties are concerned. It is also further argued by Mr.Thakore that as per the Statement of Affairs filed in the case of Jubilee by the ex-Directors of Jubilee, it is clearly established that Jubilee does not own any immovable properties and the Directors

thereof have never claimed any ownership rights in any immovable properties. The balance sheet shows fixed assets, which only comprise of plant, machinery, furniture and vehicles, but does not disclose any land and building. It was also argued by Mr.Thakore that Jubilee has never paid any consideration as agreed as per the agreement dated 24.6.1983 and since no consideration is paid, Jubilee has not acquired any title over the aforesaid immovable properties. In his submission, since Jubilee does not own any immovable properties, the Official Liquidator of Jubilee ought to hand over the immovable properties to the Official Liquidator of Calico and he cannot sell or dispose of any such properties, in as much as, Jubilee has no right, title or interest over the same. Mr.Thakore has also further argued that Jubilee also cannot be said to have become owner by adverse possession as Jubilee has come into possession of the immovable properties pursuant to an agreement dated 24.6.1983 between Calico and Jubilee and the possession of Jubilee is a permissive possession or, in any case, possession as a licensee pursuant to the agreement and, therefore, the said possession cannot be said to be adverse to the real owner.

18. Mr.Thakore has relied upon certain judgments, to which I will refer later on.

19. Mr.Thakore, for the applicant, has also further argued that since there is no transfer in the eye of law, no doctrine of estoppel can be made applicable against them. Simply they might have agreed for selling certain properties and, therefore, according to him, estoppel cannot apply against them. In his submission, even Section 53A of the Transfer of Property Act also cannot be made applicable as it cannot be said that Jubilee was ready, willing and prepared to perform the entire part of their contract as they have failed to show that they were ready to perform their part of the contract continuously and if there is a conditional willingness or partial willingness, benefit of Section 53A is not available. It is also stated that any discharge of liabilities by Jubilee of Calico would not amount to payment of consideration by Jubilee to Calico and it would only be discharge of its own liabilities, which have been taken over since `consideration' is defined in the agreement as "the difference between the value of the assets and liabilities as on the close of business on 29.6.1983". According to Mr.Thakore, since Jubilee has not paid the consideration, it has failed to perform its part of the contract and, therefore, it is not entitled to raise any defence of part performance.

20. So far as the movable properties of Calico are concerned, it is argued by Mr.Thakore that they were agreed to be transferred as per the composite agreement dated 24.6.1983. The said agreement provides for transfer of immovable and movable properties and when there is an agreement to transfer both, i.e. movable and immovable properties together, the property in movables would pass to the transferee only when the immovable properties are transferred. Since the immovable properties have not been conveyed to Jubilee by Calico, the movables, although the possession was handed over to Jubilee, also continue to be of the ownership of Calico.

Alternatively, it was argued by Mr.Thakore that assuming that the movable properties are transferred to Jubilee, the same are transferred subject to the hypothecation and the charge thereof of I.C.I.C.I. and others. The property received by Jubilee, therefore, is the total value of the property less the liability attached to them in the form of hypothecation and charge in favour of I.C.I.C.I. and others. Mr.Thakore has also relied upon the provisions of Section 529(1) of the Companies Act to substantiate his say that in the winding up of an insolvent company, the same rules shall prevail with regard to rights of secured and unsecured creditors as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. He further submitted that Section 47 of the Provincial Insolvency Act entitles the secured creditors to realise their security and recover their dues. Section 529 shall necessarily apply to the secured creditors of Calico. According to Mr.Thakore, I.C.I.C.I. and others are not secured creditors of Jubilee, but they are the secured creditors of Calico and what was transferred was subject to the rights of the secured creditors of Calico. It is the further say of Mr.Thakore that the sale proceeds of such sales (i.e. sale proceeds received by selling of movable properties) are available to first discharge the liabilities of a third party charge holder hypothecatee, viz., I.C.I.C.I. and others, and thereafter, the balance would be available for distribution to the creditors and workers of Jubilee.

Alternatively, it was submitted that since the movables are hypothecated to I.C.I.C.I. prior to their transfer to Jubilee by Calico, the properties, when transferred, would be subject to the charge of the hypothecatee and, consequently, I.C.I.C.I. would become secured creditor of jubilee to the extent of its dues and consequently, would be entitled to a portion from the

sale proceeds of the movables as per the ratio to be determined. However, this is an alternative submission without prejudice to the earlier contention that there is no transfer.

21. Mr.Thakore has also relied on various clauses of the Agreement dated 24.6.1983 to show that the properties were intended to be transferred subject to the rights of the hypothecatee, viz., I.C.I.C.I. He further submitted that simply because I.C.I.C.I. had participated in the sale, that fact, ipso facto, cannot be construed as a waiver of their rights, which rights are based on title. He further submitted that when contention was raised by some of the workers of Jubilee that I.C.I.C.I. is not a creditor of Jubilee, detailed investigation was made by them, which has, ultimately, resulted in filing of this application on their part. He has also stated that ultimately if the applicant fails to prove title over the property in question, then, the applicant is not claiming to be a secured creditor of Jubilee.

22. The aforesaid argument of Mr.Thakore was resisted by Mr.Vasavada for Textile Labour Association ("T.L.A.", for short), Mr.Mukul Sinha for some of the workmen, Mr.A.L. Shah on behalf of the Liquidator as well as by Mr.P.G. Desai on behalf of the State Bank of India.

23. It is the say of the other side that on 29.5.1983, all the properties of Calico, i.e. movable and immovable, were transferred and, thereafter, it was treated as property of Jubilee. Since the aforesaid transaction, all throughout, the property was treated as the property of Jubilee. It was stated that at no point of time, Calico had ever asserted that the property in question still belongs to them. It is also the say of the workmen of Jubilee that even before the B.I.F.R., it was never pleaded by Calico that the property in question belongs to Calico. On 8.5.1989, winding up order of Jubilee was passed and Liquidator took over possession of all its assets, movable and immovable, and possession of the property in question was also taken over by the Liquidator of Jubilee.

24. It was argued by Mr.Vasavada, for the T.L.A., that when the objection was raised by the workmen of Jubilee that I.C.I.C.I. is not the creditor of Jubilee, at that stage, Calico, for the first time, disputed the title of the property in question, which was nothing but an afterthought on the part of the Calico. It is also the say of Mr.Vasavada that Calico has never objected when possession was taken over by the Liquidator of

Jubilee and that the O.L. of Jubilee Mills Limited had filed Company Application No.200 of 1996 for the purpose of selling the entire property of Jubilee Mills Company Limited and after hearing all the concerned parties, including the present applicant I.C.I.C.I., ultimately, the Court, by its order dated 27.2.1997, constituted a Sale Committee for disposing of the properties in question. According to Mr.Vasavada, I.C.I.C.I. Limited was a party in that application, the aforesaid order was passed after hearing I.C.I.C.I. and the property was ordered to be sold. At that time I.C.I.C.I. had never objected that the property in question cannot be sold as the same is of Calico and not of Jubilee. In that view of the matter, now, once the aforesaid order was passed by this Court in Company Application No.200 of 1996, the question about the title of property is no longer open to any dispute and, in any case, it is res judicata by virtue of the earlier order, or, in any case, res integra, and between the parties, the issue is concluded. Mr.Vasavada further argued that when the question of disbursement of amount came, only at that time I.C.I.C.I. took out Company Application No.58 of 1999. He further submitted that when an application was made for disbursement of the amount by way of Company Application No.360 of 1998 at the instance of workmen of Jubilee, similar type of dispute was raised by I.C.I.C.I. and, there was an order of disbursement of amount by the learned single Judge, which was confirmed by the Division Bench, and S.L.P. which was filed against that order by the I.C.I.C.I. Limited was also rejected. Mr.Vasavada further submitted that the I.C.I.C.I. is not holding any charge over the properties in question as the charge is not registered as per law and, therefore, I.C.I.C.I. cannot be said to be a charge-holder. Mr.Vasavada also submitted that in any case, the present Judge's Summons is barred by limitation. He further submitted that Jubilee was registered as a Company under the Companies Act in 1983 and prior to 1983, it was one of the units of Calico. He submitted that the transaction had taken place in 1983 and this Judge's Summons is taken out in 1999. He submitted that this application is, therefore, required to be dismissed on account of delay, laches, waiver and acquiescence by conduct.

25. Mr.Mukul Sinha, appearing for some of the workmen, had argued that this Application by I.C.I.C.I. is nothing but an afterthought. I.C.I.C.I. has no right to pose themselves as secured creditors of Jubilee. They are not even the charge-holders over any of the properties involved. Regarding movable properties, they have no right, title or interest in the property. It is

stated by Mr.Sinha that if any undertaking was given by Calico, the same is applicable to Calico's property, but it cannot be made applicable to the property of Jubilee since Jubilee is the owner of the properties in question, I.C.I.C.I. cannot claim any right under the guise that it belongs to Calico when Calico itself has never tried to assert such right. According to Mr.Sinha, even the Liquidator of Calico does not say that the property belongs to Calico.

Mr.Sinha also further submitted that the property in question was not subjected to any charge of I.C.I.C.I. at any point of time and there is nothing on record to show that any charge was created at the time of transferring certain properties by Calico and since I.C.I.C.I. was not having any charge over the said property, even when the property was with Calico, they have no right, title or interest over the said property. He submitted that even otherwise, I.C.I.C.I. has no locus standi to file such an application. He further submitted that nobody has questioned this transfer over these years and since I.C.I.C.I. is not a party to the agreement, they have no right to challenge the said transfer. Mr.Sinha further submitted that Jubilee Liquidator has taken over the charge of the assets in 1989. Even at that time, I.C.I.C.I. never objected to such transfer or such taking over by the Liquidator of Jubilee.

26. Mr.P.G. Desai, appearing for the State Bank of India and who is the secured creditor of Jubilee states that the plant and machinery of Jubilee is not subjected to any charge of I.C.I.C.I. and that they are not the secured creditors of Jubilee. Mr. Desai also further states that I.C.I.C.I. has also filed proceedings before the Debt Recovery Tribunal, wherein the Liquidator of Jubilee is not made a party.

Mr.R.M. Desai has appeared for I.D.B.I. and Punjab National Bank. He argued that the workmen of Jubilee had no say and it is only the say of workmen of Calico which is required to be considered. Mr.Desai had also submitted that he is not a secured creditor regarding plant and machinery. He further submitted that the property went to Jubilee with hypothecation charges. He submitted that if it is held that the plant and machinery have vested in Jubilee and Jubilee has title over the same, it is subject to hypothecation.

27. Mr.A.L. Shah, who is appearing for the Liquidator of Calico, has submitted that there is a clear

intention regarding transfer of this property from Calico to Jubilee. According to him, so far as immovable property is concerned, delivery of the same is enough and when the movable property is already delivered and was ultimately subjected to sale by the Sale Committee, this Application of the I.C.I.C.I. claiming right over the same and posing themselves as creditor of Calico is not at all tenable. He has relied upon clause 8 of the agreement, which reads as under :-

> " ... ...
>
> 8. Subject to the above, the Vendor shall as soon as possible after execution of these presents but not later than 30th June, 1983:
>
> a) deliver or cause to be delivered to the Purchaser all the said Movable Assets and all Current Assets and all the assets, properties, articles and effects which are capable of being physically delivered as also all the documents, deeds, papers or writings for or in respect of or in any way connected therewith in the possession, custody or control of or otherwise available to the Vendor;
>
> b) put the Purchaser in full possession, custody and control of the said Undertaking, Business and Operations of Jubilee Mills, as its own and on its own account without any reference or recourse whatsoever to the Vendor;
>
> ... ... "

According to him, since both the sides, i.e. Calico and Jubilee, had acted upon the same, the say of the I.C.I.C.I. about hypothecation of the movable property is not tenable. I.C.I.C.I., therefore, is not entitled to apportionment of any amount which is realised from the sale of the movable property on the basis of it being a creditor of Calico. Regarding lien of unpaid vendor, Mr.Shah argued that such lien can be waived and regarding movable property, I.C.I.C.I. could have applied its right of stoppage in transit. He further submitted that

I.C.I.C.I. can lodge their claim before the Liquidator of Calico as unsecured creditor and that, in any case, they have no right, title or interest in any manner so far as the properties of Jubilee is concerned. He submitted that, even otherwise, once the property is already sold off, its original identity is also lost and, therefore, according to him, there is absolutely no basis for any claim so far as movable properties of Jubilee is concerned.

28. So far as immovable property is concerned, it was submitted by Mr.Shah that because of Urban Land Ceiling Act, sale deed could not have been executed and that in any case, Section 53A of the T.P. Act would be applicable. He submitted that Calico can still lodge their money claim before the O.L. of Jubilee. Mr.Shah has also relied upon certain judgments to substantiate his say.

29. I have heard respective Advocates appearing for both the sides, in detail. The first question which is required to be considered is whether there is any transfer of property, i.e. movable and immovable, by Calico to Jubilee and whether the applicant-I.C.I.C.I. can be said to be a charge-holder with a charge over the immovable properties in question and whether the I.C.I.C.I. has any right, title or interest on movable and immovable properties, which are, at present, in the possession of the O.L. of Jubilee Mills (in liquidation).

30. At the time of hearing of this application, it was submitted on behalf of both the sides that the status quo order of the Honourable Supreme Court so far as the dispute pending before the Supreme Court has nothing to do with the question which is involved in the present application is concerned, as, according to them, the question which is required to be considered in this application is whether certain property belongs to Calico or Jubilee. Therefore, the real question which is required to be considered here is whether the properties in question for which the present application, being Company Application No.302 of 1999, is filed, is of Calico or of Jubilee. At the time of vacating the ad interim order in this Company Application No.302 of 1999, regarding disbursement of the amount in favour of the workmen, M.S. Shah, J. had observed as under :-

> " ... ...
>
> 4.1 The Jubilee Mills Ltd., a Company

registered under the Companies Act was engaged in the business of manufacturing textiles. At the instance of some of its creditors, the Company was ordered to be wound up as per the order passed by this Court on 5.9.1989 in Company Petition No.139/86. The Official Liquidator (respondent No.1 herein) was appointed as the Liquidator of the Company. The Official Liquidator took over possession of the assets of the Company. The order for sale of the Company's assets and appointment of the sale committee was passed by this Court on 27.2.1997 in Company Application No.200/96. The sale committee comprised of the Official Liquidator and the representatives of the financial institutions and banks. The meeting of the sale committee held on 6.6.1997 for working out the modalities and fixing the upset price for sale of the plants and machineries and other items of the Jubilee Mills Ltd. was attended, amongst others, by representatives of the applicant-ICICI Ltd. and Banks. The sale committee decided to dispose of the plants and machineries of the Company by public auction. The auction was held and the sale was confirmed by this Court and an amount of Rs.4.23 Crores (approx.) is lying with the Official Liquidator as per his report dated 15.2.1999. At no point of time any body raised any objection that the plants and machineries did not belong to the Company.

The land and buildings of the Company are yet to be disposed of. Those assets could not be offered for sale earlier in view of the prohibitions contained in the Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter to be referred to as "the ULC Act") which has recently been repealed.

... ... "

It was also observed in paragraph 4.3 by this Court (Coram : M.S. Shah, J.) in the said order that in spite of having been members of or having been associated with the Sale Committee appointed by this Court in February,

1997, I.C.I.C.I. never contended that the assets in question did not belong to Jubilee Mills Limited. Of course, those were the tentative observations while vacating the ad interim order regarding disbursement of the amount in favour of the workmen.

31. In Company Application No.302 of 1999, the Official Liquidator of the Ahmedabad Manufacturing & Calico Printing Co. Ltd. has also filed affidavit-in-reply. The same is filed by one B.C. Meena, Deputy Official Liquidator of Calico (in liquidation). It has been stated in the affidavit-in-reply that there was an agreement dated 24.6.1983 entered into between Calico and Gaurav Chemtex Industries Ltd. By the said agreement, Calico agreed to sell and transfer the entire undertaking, business and operations of its Division, known as "Jubilee Unit", to Gaurav Chemtex Industries Ltd. The said Gaurav Chemtex Industries Ltd. was subsequently renamed as "Ahmedabad Jubilee Mills Ltd.". By the said agreement, Calico had agreed to sell and transfer the undertaking, business and operations of its Division "Jubilee Unit" to Jubilee. The properties sought to be sold and transferred included movable properties as well as immovable properties. As per the said agreement, it was agreed that the Vendor (i.e. Calico) shall sell, transfer and assign and the Purchaser shall purchase and accept the transfer and assignment on and from the close of business on 29th June, 1983 of the said Jubilee Unit of the Vendor as a going concern, together with the assets, property, rights and benefits thereof and the liabilities, duties and obligations relating thereto or arising out of the said business on the terms and conditions set forth in the Agreement. Clause E of the Agreement was also incorporated in the reply, which is as under :-

> " ... ...
>
> E. In the light of the above, the parties hereto have agreed that the Vendor shall sell, transfer and assign and the Purchaser shall purchase and accept the transfer and assignment on and from the close of business on 29th June, 1983 of the said Jubilee Mills (including sewing thread) of the Vendor as a going concern, together with the assets, property, rights and benefits thereof and the

liabilities, duties and obligations relating thereto or arising out of the said business on the terms and conditions hereinafter set forth.

... ... "

32. It is further stated in the reply that the said undertaking, business and operations of Jubilee Unit were sought to be transferred and assigned by the Vendor to the Purchaser at such consideration as was mentioned in the said agreement. Clause H of the recitals indicated that the lands, hereditaments and premises with buildings and structures (immovable properties) were to be transferred and assigned at the respective written down values as reduced by current and other liabilities, including short term loans, sundry creditors, provisions and term loans as on the close of business on 29th June, 1983. Plant, machinery, equipment, fixtures and fittings (machinery and equipment) and raw materials, stock in process, stock-in-trade, spares, stores and other articles and effects (which together with machinery and equipment were referred to as movable property) were to be transferred and assigned at the written down value as reduced by current and other liabilities, including short term loans, sundry creditors, provisions and term loans as on the close of business on 29th June, 1983. As per term No.6 of the Agreement, the purchaser shall take over all the employees of the vendor employed in the said undertaking, business and operations on not less favourable terms and conditions than those on which they were employed by the Vendor with continuity of service.

Therefore, as per the said affidavit-in-reply, the Purchaser has taken over all the workers of the vendor. It is also stated in the reply that as per Term No.8 of the Agreement, the Vendor shall, as soon as possible, after execution of the said Agreement, but not later than 30th June, 1983, deliver or cause to be delivered to the Purchaser of the said movable assets and current assets, put the Purchaser in full custody and control of the said undertaking, business and operations of Jubilee Unit as its own and on its own account without any reference or recourse whatsoever to the Vendor. It is stated in the reply that the consideration for the said transfer and assignment can be said to have been divided into two parts, viz., Jubilee taking over all liabilities and obligations of Calico in respect of the said unit and the balance payable amount to be determined after deducting from the written down value of the properties the total of the said liabilities and

obligations. Jubilee's taking over of the employees of Calico on not less favourable terms and conditions can also be said to be part of the consideration. It is also stated in the reply that the consideration as per the Contract Act { Section 2(d) } does not limit itself to only monetary consideration and consideration for the transfer and assignment of the said Unit can be said to be Jubilee taking over all liabilities and obligations of Calico in respect of the undertaking, business and operations of Jubilee Unit and Jubilee taking over all employees of Calico in respect of the said undertaking, business and operations on not less favourable terms and conditions, Jubilee paying such amount as is arrived at after deducting from the written down value of the movable and immovable assets of the said Unit the liabilities and obligations in respect of the said Unit taken over by Jubilee. As regards the payment of the amount that would be found to be payable (payment of money being only part of the consideration, and other part being negative consideration, i.e. taking over of liabilities, obligations, etc.), Rs.1,00,000/- was to be paid by way of earnest money or deposit and the balance purchase price was to be payable on demand.

It is further stated in the affidavit on behalf of the Official Liquidator of Calico that as far as the Office of the Liquidator is aware and it appears to be undisputed that pursuant to the said agreement, Jubilee took over all the employees of Calico employed in the said undertaking, business and operations pursuant to Term No.6 and that in pursuance of Term No.8, Jubilee was delivered all the movable assets and current assets and all the assets, properties, articles and effects capable of being physically delivered and that Jubilee was put in full possession, custody and control of the said undertaking, business and operations of Jubilee Unit as its own and on its own account without any reference or recourse whatsoever to the Vendor. It is stated in the reply that in view of the restrictions under the Land Ceiling Act, conveyance of immovable property could not be executed and permission and clearance of land ceiling authorities were awaited. It is further stated that it is nobody's case that Jubilee was not ready and wiling to perform the balance part of its obligation under the Agreement and that looking to the overall tenor of the agreement, the intention of the parties was to put Jubilee in full possession, custody and control of the said undertaking, business and operations (including movable properties as well as immovable properties) as its own and on its own account without any reference or recourse whatsoever to the Vendor. It is also stated

that after 30th June, 1983, the date on which Jubilee was put in possession, custody and control of the said undertaking, business and operations, Calico did not pay anything towards the liability and obligations of the said Unit thereafter and Jubilee carried on the business and must have paid the liabilities and obligations taken over by it. Even the movable assets, which were delivered to Jubilee, might have been sold, destroyed or might have been otherwise changed over a period of time, i.e. from 30.6.1983, the date on which the possession was handed over and till Jubilee was ordered to be wound up. The sales realisation from the sale of immovable properties of Jubilee now with the Liquidator of Jubilee cannot be said to be from out of the sale of movable properties transferred and delivered to Jubilee by Calico several years ago, i.e. on 30.6.1983.

Reference to Section 53A of the Transfer of Property Act is also made in the said reply.

33. Now, therefore, as per the reply of the Official Liquidator of Ahmedabad Manufacturing & Calico Printing Co. Ltd. (in liquidation), Calico has no right, title or interest over the property in question and it is clearly stated that Jubilee has become owner from the date of the transfer.

34. On behalf of the Applicant, affidavit filed by one S.S. Stlekar, General Manager of Calico in Company Application No.32 of 1991 in Company Petition No.139 of 1988 was relied upon, wherein it is stated that 128 looms were never transferred to Jubilee Mills during the reorganization and there was no sale or agreement to sell entered into between Calico and Jubilee Mills or their counterpart Gaurav Chemtex Ltd. The said reply is at page 57 of Company Application No.302 of 1999.

35. On behalf of respondent No.3, Secretary of the Textile Labour Association ("T.L.A.", for short) has filed the reply affidavit. It is pertinent to note that so far as T.L.A. is concerned, it represents case of all the textile mills and accordingly, T.L.A. is representing workmen of both Calico as well as Jubilee. In the affidavit-in-reply on behalf of the T.L.A., its Secretary has stated that the Judge's Summons is not maintainable. It is also stated in the reply that the applicant was not a party to the contract which were entered into between Calico and Jubilee and, therefore, they have no right to file such application and that the present application is delayed by 16 years as the transaction had taken place in June, 1983. In paragraph

15 of the reply it is stated that with effect from 1983, the reorganization has taken place and assets in the name and style of plant and machinery which were transferred to Jubilee Mills were belonging to Jubilee Mills and ultimately, Jubilee became the owner of the same. It is also stated that since the applicant is a party to the Sale Committee for selling the assets of Jubilee, which include the disputed property, it is now not open for them to take a contrary stand. Accordingly, the aforesaid application is resisted by the T.L.A.

36. Now, the first point which is required to be considered is whether the applicant-I.C.I.C.I. has got any locus standi to move this application and whether it can be said that the property in question was transferred in favour of Jubilee along with the charge of I.C.I.C.I. In Company Application No.360 of 1998, affidavit-in-reply has been filed by I.C.I.C.I., wherein a stand is taken to the effect that some of the assets of Calico on which charge was created in favour of I.C.I.C.I. came to be transferred to Jubilee Mills along with the charge of I.C.I.C.I. and that the said property was taken by Jubilee Mills along with the charge of I.C.I.C.I. and thus, I.C.I.C.I. is a secured creditor of Jubilee Mills. It is pertinent to note that particulars are given about the assets on which such charge was crated in favour of I.C.I.C.I. at the time of transferring of property in the year 1983. At this stage, it is pertinent to note that the applicant is not in a position to point out whether the said charge was registered at the relevant time in 1983 when the properties were transferred from Calico to Jubilee. It is pertinent to note that the I.C.I.C.I. was not at all shown as secured creditor. It is required to be noted that reorganization has taken place as back as in 1983. Present Applicant I.C.I.C.I. is not a party to the Agreement in question and since 1983 onwards, the property was managed by Jubilee treating itself as the owner of the said property in question. So far as the movable properties are concerned, on delivery of possession, Jubilee has become owner of the same. Looking to the facts and circumstances of the case, I am of the opinion that it cannot be said that the property in question which was subject matter of transfer in the year 1983 belong to Calico and that Jubilee was holding merely a permissive possession. At no point of time Calico had ever asserted its rights over the property in question. It is only at a stage when question about distribution of sale proceeds from the sale of the properties of Jubilee arose and when an objection was taken by the workmen of Jubilee about

the status of I.C.I.C.I. questioning the status of secured creditors of Jubilee that ultimately I.C.I.C.I. made a grievance for the first time stating that the property in question belonged to Calico and not to Jubilee and that Jubilee had only possession. Prima facie, therefore, it seems that this is nothing but an afterthought on the part of the present applicant. At no point of time Calico tried to claim the title on themselves. No proceedings were taken by Calico by filing suit for non-payment of balance of consideration. Since 1983, all throughout, the property remained with Jubilee and the machinery was used by Jubilee. All throughout, Jubilee acted on the basis of ownership rights over the said property and on its liquidation, the said property went into the hands of the Liquidator of Jubilee. At no point of time the present applicant had ever objected the action of the Liquidator in treating the property as of Jubilee and ultimately, the same was put to sale by appointing Sale Committee, in which the present applicant had also taken active role. Jubilee was subsequently registered as a separate Registered Company with the Registrar of Companies. It is required to be noted that in May, 1989, winding up order was passed by this Court and the Official Liquidator took the possession of plant and machinery and all assets of Jubilee Mills Ltd. (in liquidation).

37. At this stage, affidavit-in-reply filed by one Harjivanbhai Patel on behalf of T.L.A. is also required to be considered. It has been stated in the said affidavit-in-reply at page 77 that in Company Application No.32 of 1991, Calico had raised a dispute about 128 looms (Ruti Towel) and (Ruti B) on the ground that the same was belonging to Calico and rest of the machinery belonged to Jubilee Mills. The affidavit was filed by one Mr.Navinchandra Ratilal Shah, the Accountant of Calico, wherein it was stated that only 128 looms belonged to Calico and rest of the plant and machinery belonged to Jubilee. It is stated on behalf of T.L.A. that T.L.A. had entered into an agreement with Calico on 5th February, 1992 and as per the same, part of machinery belonged to Calico and they were agreed to be transferred back to Calico and the same was transferred prior to the sale of the plant and machinery to Jubilee.

It is clearly stated in the said reply in paragraph 18 at pages 77-78 that the machineries which were transferred back to Calico are still lying in the premises of Calico and that I.C.I.C.I. was party to Company Application No.32 of 1991 and at that point of time also, they had not raised any objection which

subsequently they have raised. The agreement in question is also annexed as Annexure `III'.

It is also pertinent to note that as per the order of this Court (Coram : S.D. Pandit, J.), which is at Annexure `IV', on 27.2.1997, this Court permitted the sale of the entire property of Jubilee which had gone into liquidation as per the order of the Court on 5.9.1989 and after hearing all the concerned parties, including the present applicant, the Sale Committee was constituted, to which the applicant was one of the parties and, therefore, at that stage, it was almost an admitted position that the property in question belongs to Jubilee and otherwise there was no question of putting the said property to sale if it really belonged to Calico at the relevant time. Under these circumstances, now it is not possible for this Court to take a contrary view and reach a different conclusion despite the aforesaid circumstances, especially in view of the order of this Court passed in Company Application No.200 of 1996. Hence, now it is not possible to say that the property in question belongs to Calico, in which the present applicant is having charge. On the basis of the order passed by this Court in Company Application No.200 of 1996 dated 27.2.1997, advertisement was issued on 3rd July, 1997 in daily "Gujarat Samachar", which also indicates that the plant and machinery of Jubilee are to be disposed of on "As Is Where Is" basis. The aforesaid advertisement is Annexure `V' at page 191 with the affidavit-in-reply of T.L.A. In the said advertisement also, it is clearly mentioned that plant and machinery (excluding sewing thread plant) are belonging to Jubilee Mills Company Limited (in liquidation). Even at the time of advertisement also, no objection was taken on behalf of the present applicant. It is also pertinent to note that this Court has also confirmed the sale in January, 1998, confirming the sale effected by the Committee. At that time also, I.C.I.C.I. had not objected to the same. The balance sheet indicating the affairs of Jubilee does note show I.C.I.C.I. as one of the secured creditors.

38. Even as per Clause 8 of the Agreement, it is provided that the vendor shall as soon as possible after the execution of these presents but not later than 30th June, 1983 deliver or cause to be delivered to the Purchaser all the said movable assets and all current assets and all the assets, properties, articles and effects which are capable of being physically delivered as also all the documents, deeds, papers or writings for or in respect of or in any way connected therewith in the possession, custody or control of or otherwise available

to the vendor and put the purchaser in full possession, custody and control of the said undertaking, business and operations of Jubilee Mills as its own and on its own account without any reference or recourse whatsoever to the vendor. This agreement has been acted upon all throughout since 1983 and, as stated earlier, after objection was taken regarding the status of I.C.I.C.I. so far as Jubilee is concerned, at that stage, the present application seems to have been filed. Therefore, this is nothing but a clear afterthought on the part of the applicant. On the basis of the Agreement in question, Jubilee has taken over possession and has acted, all throughout, as an owner of the property in question. Even otherwise, there is nothing to show that at the relevant time, i.e. in 1983, any charge was created so far as the immovable property is concerned in favour of the present applicant. The document creating the charge naturally is required to be registered under the provisions of the Registration Act. Therefore, also it cannot be said that the property was transferred in favour of Calico with a charge of the present applicant over the same. So far as the movables are concerned, the Vendee gets the title moment it receives the possession. The present applicant, therefore, is not a party to the agreement in question and, there is nothing on record to show that there was any subsisting charge in their favour at the relevant time, i.e. in 1983, and it cannot be said that they have any right to challenge the aforesaid transaction, that too, after the lapse of so many years. At the time of transfer, Jubilee has undertaken the liability to take over the employment of the concerned workmen, who were working in Jubilee Unit and who were transferred to Jubilee. I agree with the submission of Mr.A.L. Shah, appearing for the O.L. of the Calico, that the possession of the entire Unit, undertaking, business and operations and its custody and control was handed over to Jubilee pursuant to the Agreement in question and most part of the Agreement was actually performed and in performance of the said Agreement, possession of movable as well as immovable properties were transferred to and handed over to Jubilee and in view of the restriction under the Land Ceiling Act, conveyance of the immovable property could not be executed as the permission and clearance of land ceiling Authorities were awaited. However, simply because of the fact that no conveyance had taken place, the present applicant cannot take advantage of that situation and there is nothing on record to show that there was any subsisting charge in their favour at the relevant time and in absence of the same, naturally, the applicant would not have any locus standi to challenge the said

transaction especially when the applicant is a stranger to the said agreement. The Liquidator of Calico has also stated in his affidavit that Calico had never demanded the payment of balance monetary consideration till Jubilee was ordered to be wound up. It cannot be said, therefore, that Jubilee was not ready, willing and prepared to perform the remaining part of its obligation under the Agreement. In fact, substantially, the same was complied with. They have taken all the employees of Calico in respect of the said unit, taking all the labilities and obligations in respect of the said unit and, therefore, looking to the aforesaid facts and circumstances of the case, it cannot be said that Jubilee was not put in full possession and full control of the Undertaking, business and operations of Calico and considering Clause b) of Term No.8, it is clear that it has considered the same as its own and on its own account without any reference or recourse whatsoever to the Vendor. Even otherwise, it has been said by the O.L. of Calico in paragraph 9 of his reply that on 30th June, 1983, the date on which the Jubilee was put in possession, custody and control of the said Undertaking, business and operations, Calico did not pay anything towards the liability and obligations of the said Unit thereafter and Jubilee carried on the business and it must have paid the liabilities and obligations taken over by it. Even the movable assets which were delivered to Jubilee might have been sold, destroyed or might have been otherwise changed over a period of time, i.e. from 30th June, 1983, the date on which possession was handed over and till Jubilee was ordered to be wound up. The sales realisation from the sale of immovable properties of Jubilee now with the Liquidator of Jubilee cannot be said to be from out of the sale of movable properties transferred and delivered to Jubilee by Calico several years ago on 30.6.1983.

39. Mr.Vasavada, who is appearing for the T.L.A. and who represents the case of workmen of both, i.e. Calico as well as Jubilee, also clearly states that even the stand of the workmen of Calico is also to that effect that the property in question belongs to Jubilee.

Looking to the aforesaid facts and circumstances of the case, especially when the property was transferred in 1983, there was nothing to show that the present applicant was having any charge over the immovable property, and, therefore, it is not possible to accept the say of the applicant that the property in question belongs to Calico and that in any case, since there is no conveyance, Jubilee cannot be said to have acquired any

title over the property in question. It is too late in the day now to accept the aforeaid say of the applicant as much water has flown thereafter. As stated earlier, the applicant itself agreed to sell the property in question, treating it as the property of Jubilee. This Court has also, considering the same as property of the Jubilee, allowed to sell the property by appointing Sale Committee (as per the order of S.D. Pandit, J.). It, therefore, cannot be said that when the property was transferred from Calico to Jubilee, it was transferred subject to charge in favour of the applicant over the immovable property. In any case, the applicant herein cannot have any locus standi now to say that for want of registered conveyance, there is no valid transfer in favour of Jubilee by Calico. There is also nothing on record to show that the present applicant is a secured creditor of Jubilee. It is, therefore, not possible to accept the say of the present applicant that the Official Liquidator of Jubilee should hand over the properties to the Official Liquidator of Calico. Looking to the circumstances of the case, it cannot be said, therefore, that the possession of Jubilee was in any way a permissible possession. In any case, it is not open for the present applicant to challenge the title of Jubilee in the present proceedings. Even otherwise, it cannot be said that Jubilee was not ready to perform its part of the contract as per the facts and circumstances of the case.

40. At this stage, some authorities cited by Mr.Thakore are also required to be considered.

Mr.Thakore relied upon the decision in The State Bank of Travancore v. Arvindan Kunju Panicker and others, AIR 1971 SC 996. Relying upon the aforesaid authority, he submitted that a permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of the true owners for a period of twelve years or more. Where the suit property of Tharwad was all along in the possession of tenants, the possession of a person who has only a lien over the property for the amount advanced by him, will be symbolical and will only be permissive possession. Also, subsequent purchaser of that person's right can have no better title than what that person had. So in absence of evidence to show that that person or his successor-in-interest asserted any hostile title to the suit property to the knowledge of the true owners at any time before the suit, their possession cannot be said to be adverse possession. However, so far as the facts of

the present case are concerned, the question is whether as back as in 1983, the property was transferred by virtue of agreement in favour of Jubilee and whether Jubilee has become the owner from the aforesaid date of transfer having been put in possession of the property in question. From 1983 onwards, the property were in the possession of Jubilee and everybody treated Jubilee as its owner. There is nothing on record to show that at any point of time Calico had ever tried to assert its rights over the property in question. The agreement as such was acted upon. A Reference to Clause 8 is already made earlier and by virtue of the aforesaid transfer itself, the Jubilee had become owner of the same. Real owner Calico had never objected at any point of time asserting any right in their favour in the property in question. The present applicant is not a party to the said Agreement in question. There is nothing to show that there is any valid registered charge in their favour at the time when the property was transferred in the year 1983. In that view of the matter, it is not open for the applicant, therefore, to question the agreement in question or to say that the property, as such, belongs to Calico and for want of a registered document of conveyance, the title has not passed on in favour of Jubilee. It is true that a tenant cannot claim adverse possession. Here, the question is not of adverse possession, but the question is whether Jubilee has become the owner of the property in question by substantially performing the contractual obligations as per the agreement. In the facts and circumstances of the case, therefore, it is not possible to believe that the title has not passed in favour of Jubilee. In any case, it is not open for the present applicant to challenge the aforesaid transaction or even the title of Jubilee as per the facts and circumstances stated hereinabove.

Mr.Thakore has also further relied upon the judgment of the Apex Court in Marwari Kumhar and others v. Bhagwanpuri Guru Ganeshpuri and another, (2000) 6 SCC 735 on adverse possession.

Mr.Thakore further relied on the decision in Taijbai and others v. Hasan Khan, AIR 1987 Madhya Pradesh 219, wherein the Madhya Pradesh High Court has held that the person in possession of land under agreement to sell could be said to be in permissive possession and would not be permitted to raise plea of adverse possession. It is further held in the aforesaid judgment that possession is a question of fact and the extent of possession is also a question of fact. It has been further held in paragraph 14 as under :-

" ... ...

14. The question which arises for consideration is whether appellant's possession can be said to be adverse and as to when it became adverse to the plaintiff/respondent? Admittedly, the defendant/appellant was in possession of the suit land on the basis of an agreement to sell, although the said agreement could not be materialised for want of sanction by the Competent Authority, as required under Section 45 of the Indore Land Revenue and Tenancy Act, 1931. Whether such possession can be said to be adverse and remaining and continuing to be in possession on the strength of such an agreement, can attract the doctrine of `adverse possession'? Shri Chaphekar, learned counsel for the respondent, has submitted that in the first place, it was for the defendant/appellant to plead and prove how and from what time their possession, which was initially permissive, changed its character and became adverse, unless such a plea is specifically raised in the pleading and proved, the appellants cannot, merely on the basis of their possession in pursuance to the agreement for sale claim `adverse possession'. Learned counsel placing reliance on a decision of the Supreme Court as reported in AIR 1971 SC 996, State Bank of Travancore v. Arvindan Kunju, submitted that such possession is permissive and not adverse. The Supreme Court held :

"Where the suit property of Tharwad was all along in the possession of tenants, the possession of a person who has only a lien over the property for the amount advanced by him will be symbolical and will not be permissive possession. Also, subsequent purchaser of that person's right can have no better title than what that person had. So in absence of evidence to show that that person or his successor in interest asserted any hostile title to the suit property to the knowledge of the true owners at any time before the suit their possession cannot be said to be adverse

possession."

"A permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of true owners for a period of twelve years or more."

Shri Gokhale, learned counsel has placed reliance on a decision as reported in AIR 1924 Nag 222 Kasturi v. Baliram, and submitted that appellants' possession should be deemed to be adverse. The judgment relied upon relates to an oral gift or transfer of property by gift, the donor divesting himself of all the characteristics of ownership, while in the case of an agreement for sale of property, the element of ownership is retained by the vendor. This case, therefore, has no application to the facts of the instant case. Kasturi's case, (AIR 1924 Nag 222) is based on Privy Council's decision as reported in AIR 1919 PC 44 Varada Pillai v. Jeevarathanammal ...."

However, so far as the facts of the present case are concerned, at the time of transfer, right is already created in favour of the transferee. Clause 8 of the Agreement is also very pertinent on this aspect. The liability of employment has already been taken over by the transferee and, in any case, the original vendor had never raised any dispute any point of time in this behalf. The present applicant is a total stranger to the agreement. Under these circumstances when the original vendor and vendee have already considered that the sale, as such, is complete, and the vendee was already put in possession and he had also acted on the basis of the aforesaid agreement, all throughout, it can be said that the vendee has become the owner of the immovable property and the question of adverse possession is, therefore, not required to be considered as it is not the case of the vendee that they have become owners by virtue of adverse possession. Looking to the facts and circumstances of the case, it cannot be said that the vendee's possession was permissible all throughout.

Mr.Thakore thereafter has relied upon the decision in V. Muthiah Pillai v. Vedambal, AIR 1986 Madras 106, which is also regarding adverse possession

and which says that permissive possession does not become hostile till there is an assertion of an adverse possession to the knowledge of the owner. Looking to the facts, as stated above, the aforesaid ruling also is not helpful to the applicant.

Another judgment cited by Mr.Thakore is the decision in Jahurul Islam v. Abul Kalam and others, AIR 1991 Calcutta 132, which was also regarding adverse possession on the ground that mere possession even of a trespasser does not constitute adverse possession unless accompanied by open assertion of hostile title. It is not possible, therefore, to believe the say of the I.C.I.C.I. that for want of registered conveyance, there is no transfer of property from Calico to Jubilee. Even otherwise, that question is not required to be examined at the instance of the present applicant, who cannot be said to have any locus standi as he is not a party to the agreement and there is nothing to show that when the property was transferred, there was subsisting charge in favour of the present applicant in the said immovable property. Mr.Thakore has also argued that benefit of Section 53A of the Transfer of Property Act is also not available to the vendee, for which he has relied on the decisions in Bechardas Damodardas Kachia v. Borough Municipality of Ahmedabad, AIR 1941 Bombay 346 and Mohan Lal v. Mira Abdul Gaffar and another, AIR 1996 SC 910. It has been held by the Bombay High Court in AIR 1941 Bombay 346 (supra) that Clause 3 of Section 53A of the Transfer of Property Act makes it a condition that transferee has performed or is willing to perform his part of the contract. Section 53A is primarily intended for the benefit of the transferee and when the section speaks of performance or willingness to perform his part, it must mean complete performance or complete willingness so far as he is concerned. It is no sufficient compliance with the condition that the transferee should have performed his part of the contract to some extent. According to Mr.Thakore, simply because to some extent the contract is performed, the benefit of Section 53A cannot be given to the transferee. However, whether there was sufficient compliance or not is required to be considered from the facts and circumstances of each case, and, as stated earlier, at no point of time till Calico also went into liquidation it had ever asserted its rights over the properties in question and, all throughout, Jubilee had acted after taking liability of the employees of Calico and it would have been a different thing if Calico had ultimately tried to take proceedings for getting part of unpaid consideration,

but, surely, the present applicant cannot say that there is no transfer of property from Calico to Jubilee and that no title has passed in favour of Jubilee. However, even otherwise, looking to the facts of the case, it is clear that Jubilee has substantially complied with the Agreement for Sale and the registered sale deed could not be entered into because of the provisions of the Urban Land Ceiling Act. All throughout, Jubilee has acted as if it is the owner of the property in question since 1983 at all points of time. Even the present applicant itself has treated them as owners having taken part in transaction of sale as a Member of the Sale Committee.

So far as the decision in Mohan Lal v. Mira Abdul Gaffar and another, AIR 1996 SC 910 is concerned, the said case was regarding part performance of a contract. In the said judgment, the Supreme Court has said that the party in possession of the suit land pursuant to the said agreement cannot take plea of title by adverse possession. Here, the vendee is not taking a plea of adverse possession on the basis of the Agreement for Sale at all. If a party is put to possession by Agreement for Sale, he is supposed to perform his part of the agreement and, naturally, till then, he cannot take plea of adverse possession. However, so far as the facts of the present case are concerned, the things are entirely different and at the relevant time the vendor has never made any grievance, and, in fact, the vendor has, all throughout, treated the vendee as the owner of the property in question.

41. At this stage, the stand taken by the Official Liquidator of Calico is also required to be seen. In the affidavit on behalf of the O.L. of Calico, it is stated that the possession of the entire unit, undertaking, business and operations and its custody and control was handed over to Jubilee pursuant to the agreement and most part of the agreement was actually performed and in performance of the said agreement, possession of movable as well as immovable properties was transferred to and handed over to Jubilee. As regards payment of Rs.1,00,000/- by way of earnest money as laid down in Term 2(b), it is stated that it is not the case of the applicant that the said earnest money was not paid by Jubilee to Calico. The balance monetary part of the consideration was payable on demand and as per the records available with the Office of the O.L. Calico never demanded the payment of the said balance monetary part of consideration before Jubilee was ordered to be wound up and that the actual conveyance could not be

executed because the permission under the Land Ceiling Act was awaited. It was stated that at no point of time, it is ever stated by any one that Jubilee was not ready, willing and prepared to perform the balance part of its obligations under the agreement and that all that could be performed, had been performed by Jubilee, i.e. taking over all employees of Calico, talking over all liabilities and obligations in respect of the said Unit, etc.

The Liquidator of Calico, in his affidavit, has also stated that the movable assets which were delivered to Jubilee might have been sold, destroyed or might have been otherwise changed over a period of time, i.e. from 30th June, 1983, i.e. the date on which the possession was handed over and till Jubilee was ordered to be wound up. It is stated that the sales realisation from the sale of immovable properties of Jubilee now with the Liquidator of Jubilee cannot be said to be from out of the sale of movable properties transferred and delivered to Jubilee by Calico several yeas ago, i.e. on 30th June, 1983.

Looking to the facts of the case, therefore, moment the movable property is transferred, transaction of sale is complete and whatever are the sale proceeds which are available to the Liquidator are required to be distributed amongst various types of creditors of Jubilee.

42. Mr.Thakore's next argument was regarding movable property. According to him, both movable and immovable properties are transferred together. The property in movables would pass to the transferee only when the immovable properties are transferred. According to him, since the immovable properties have never been conveyed to Jubilee by Calico, movables also continue to be of the ownership of Calico even if possession might have been transferred for which he has relied upon the decisions in Commissioners of Stamps v. Queensland Meat Export Company Limited, 1917 AC 624 and Commissioner of Income-Tax, Kerala v. A.D. Cotton Mills (P) Ltd., 72 ITR 421. He has also relied upon Benjamin on Sale of Goods. However, as stated earlier, it is difficult for the applicant, who is not a party to the Agreement, to raise this plea. So far as the movables are concerned, not only they are transferred, but in the transaction of sale, it was a member of the Sale Committee. After selling, even the sale proceeds have also been received. Under these circumstances, therefore, the argument of Mr.Thakore that since there is a composite agreement of

movable and immovable properties and since immovable properties are not transferred, simply by handing over possession of movable properties, the vendee cannot be said to have become even the owner of immovable properties cannot be accepted. In the instant case, as per the earlier discussion, Jubilee had become owners of both immovable and immovable properties. Not only that, the immovable properties are already sold away. The fact that movables were allowed to be sold as per the order of this Court means that, naturally, they are allowed to be sold free from all encumbrances. The submission of Mr.Thakore regarding movable properties is also not possible to be accepted. It is not possible to believe that the properties in question were transferred subject to the charge of the hypothecatee and consequently, I.C.I.C.I. would become secured creditors of Jubilee to the extent of its dues and consequently, would be entitled to a portion from the sale proceeds of the movables as per the ultimate determination of the ratio. The applicant can never be said to be a secured creditor of Jubilee in any manner. Even otherwise, so far as movable properties are concerned, the most important criterion is the delivery of possession. When possession is transferred, the vendee gets the ownership of the movable properties and hence, he becomes the full owner of the same. The vendor could have effected stoppage in transit, but the movable properties have already been transferred and have now been sold, destroyed or might have been otherwise changed over a period of time and at this stage, it is not possible to believe that the applicant has still got right over the movables of Calico. Even otherwise, the identity of the original movable property now is lost because of the passage of time and irreversible position is now created. By virtue of the subsequent transactions, Calico can claim their monetary claim, if at all it is there, from the O.L. of Jubilee, if any consideration is due towards any claim.

43. Considering the aforesaid facts and circumstances of the case, therefore, it cannot be said that the plant and machinery of Jubilee were subjected to any charge of I.C.I.C.I. nor can it be said that they are the secured creditors of Jubilee.

44. At this stage, submission of Mr.P.G. Desai, who is appearing for State Bank of India and who is one of the secured creditors of Jubilee, is also required to be noted. He submits that the plant and machinery of Jubilee is not subjected to any charge of I.C.I.C.I. and that they are not the secured creditors of Jubilee. Mr. Desai also further states that I.C.I.C.I. has also filed

proceedings before the Debt Recovery Tribunal, wherein the Liquidator of Jubilee is not made a party, and according to him, they have suppressed this fact from this Court in this Company Application.

45. It is not possible to believe that even if the properties in question are transferred, it is subject to charge regarding immovable properties and subject to hypothecation of movable properties. It is also required to be noted that when the proceedings were before the B.I.F.R., at no point of time any such contention was taken that certain properties in question were of Calico. It is required to be noted that when the properties have already come to Jubilee in 1983 and Jubilee have become owners in 1983, naturally, now, when Jubilee had gone into liquidation, the same are required to be governed by the provisions of the Companies Act, 1956 and if the properties are required to be sold and if any amount is required to be disbursed, the same is required to be disbursed as per the provisions of the Companies Act.

46. Regarding some other land transactions, Calico had filed an application under Section 536(2) of the Companies Act for permission of the Court to validate the said transactions involving disposition of the properties by Calico as the lands were obtained by Calico in the ordinary course of business. The said application was registered in the year 1991 as Company Application No.10 of 1991 in Company Petition No.121 of 1987. The learned single Judge took the view that any financial arrangement which may be entered into by Calico after commencement of winding up and which may entail disposition of any of the properties shall not result in any such disposition of the properties, and disposition of properties which may take place shall be void. The said Judge's Summons was accordingly disposed of and appeal against the same, being O.J. Appeal No.2 of 1993, was also dismissed and the matter is pending before the Honourable Supreme Court. Initially, in S.L.P. (Civil) No.10278 of 1995, the Honourable Supreme Court issued notice and on leave being granted, it was numbered as Civil Appeal No.4410 of 1997 and in the said appeal, status quo order is granted as regards Calico's property. As stated earlier, however, Advocates on both sides have submitted that those proceedings have nothing to do with the question which is required to be decided in the present Company Application. In the instant case, as stated earlier, at the time of transfer, as back as in 1983, there was nothing on record to show that Calico was having any charge over the properties in question. There was no registration of such charge. Ultimately, therefore, the

status of the applicant would be in the nature of an ordinary creditor of Calico.

47. Mr.Vasavada has relied upon the judgment of the Honourable Supreme Court in Kadiyala Rama Rao v. Gutala Kahna Rao (Dead) By LRs. and others, (2000) 3 SCC 87. In the said judgment, the Supreme Court has said that in an application under Order 21 Rule 90 of the CPC for setting aside sale of property in execution of decree, the grounds are limited. Issue of "saleable interest" cannot be raised in Application under Order 21 Rule 90. The permitted grounds of challenge under Order 90 are stipulated in the provision itself, viz., material irregularity and fraud. Issue of saleable interest can only be raised by the purchaser under Order 21 Rule 91. According to him, therefore, the sale in question cannot be set aside at the instance of the present applicant, who is a stranger to the agreement and that it cannot be said that the sale in question is vitiated by fraud in any manner.

Even otherwise, the applicant can file substantive proceedings to prove their title, but in the present proceedings which are in the summary nature, the relief cannot be granted. In any case, the applicant should have filed substantive title suit to prove their title in the civil court, but instead of getting their rights adjudicated in suit, the applicant is invoking jurisdiction by way of the present application wherein proceedings are to be decided in a summary manner.

Even the Statement of Affairs, as submitted under Section 454 of the Companies Act, does not show any charge of I.C.I.C.I. over the properties in question.

Looking to the facts and circumstances of the case, it can never be said that I.C.I.C.I. was having any charge over the properties in question and it cannot be said that Jubilee received the property in their hands with a charge of I.C.I.C.I. over the immovable property and further, it cannot be said that the applicant received the movable properties with any hypothecation.

It was also submitted by the Advocates for the other side, i.e. by Mr.Vasavada, Mr.P.G. Desai, Mr.A.L. Shah and by Mr.Sinha, that at the relevant time, even I.C.I.C.I. was having active say in the management of Calico and, naturally, if there was any charge over the property in question, they would have taken care in this behalf.

Even otherwise, when the property is put to sale, naturally, the purchaser will get the possession free from all charges, especially when the same will be a sale through the Court and I.C.I.C.I. had allowed such sale to take place as they have participated as a member of the Sale Committee.

48. Under these circumstances, therefore, it is not possible to accept the contention of the applicant herein that there was no transfer from Calico to Jubilee so far as the immovable property is concerned or that the same is transferred with the charge of the applicant over the said property. Looking to the circumstances of the case, it is clear that these proceedings have been taken as an afterthought proceedings moment their status as creditor of Jubilee was challenged by the other side. Prima facie, therefore, it cannot be said that the applicant herein had got any right, title or interest over the immovable property, which is in possession of Jubilee. It also cannot be said that Calico has any right, title or interest over the property in question. Even otherwise, considering the totality of the circumstances, therefore, this Applicaiton is absolutely devoid of merit. Even in the list of charge holders, at the time of transfer, name of the applicant is not there. They have not registered their charge at all and, therefore, prime facie, they have no locus standi now to make any grievance. At the most, they are ordinary creditors of Calico. In any case, it is for the O.L. of Calico to ask for consideration. Even the O.L. of Calico is not saying that the property in question belongs to Calico. At the cost of repetition, it is required to be stated that the applicant has not bothered to get the charge registered. In fact, total negligence was exhibited at the relevant time by the applicant and, therefore, ultimately, if they are subjected to any loss, they must thank themselves. This default on the part of the concerned Officers at the relevant time may be investigated by the applicant to find out the responsible person for such negligence.

49. On all these grounds, therefore, no relief as prayed for by the applicant is required to be granted. Company Application No.302 of 1999 is required to be rejected and is accordingly rejected. Notice is discharged with no order as to costs. Interim relief, if any, shall stand vacated.

50. Similarly, Co. Application No.58 of 1999 is also rejected. Notice is discharged.

51. So far as Company Application No.66 of 1999 is concerned, since it is concerned with the disbursement of the dues, it is required to be heard separately as the order is required to be passed after hearing the creditors of Jubilee. The said matter is now to be posted for orders on merits and appropriate order can be passed only after hearing the concerned creditors.

52. So far as Company Application No.244 of 2000 is concerned, the said application is required to be posted separately for hearing as the order is required to be passed after hearing the creditors of Jubilee.

53. So far as Company Application No.360 of 1998 is concerned, the same also may be listed for hearing as the question of disbursement of amount is required to be considered and the same is required to be done after hearing the concerned creditors, as in the present Company Application No.302 of 1999, this Court has mainly decided the question about the title over the property in question and the question of disbursement of the amount has not been considered as such in this Application and, therefore, such prayer is required to be dealt with separately and for that purpose, the said application is also required to be notified by the office for hearing.

19th January, 2001 (P.B. Majmudar, J.)

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Further Order

At this juncture, Mr.Mihir Thakore, along with Mr.Singhi, requested that the status quo as on today may be continued for some time so that in the meanwhile, proceedings for disbursement of the amount may not be taken by the other side. In the facts and circumstances of the case, status quo as on today regarding the property in question to be maintained till 5.2.2001 to enable the applicant to take further recourse to law.

19th January, 2001 (P.B. Majmudar, J.)

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(apj)